Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-74

IN THE SUPREME COURT

UNITED STATES OF AMERICA

MELESIO MANUEL TAPIA - ACUNA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
(From Ninth Circuit)

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Attorney for Petitioner

Two questions are presented for review:

1. Is the discretionary relief set forth in 8 USC §1182 (c) available to an alien found deportable for conviction of a drug related crime pursuant to 8 USC §1251 (a)(11)?. The Ninth Circuit has ruled repeatedly that such an alien is not eligible for the said discretionary relief; Petitioner asserts that he <u>is</u> eligible to apply for this discretionary relief.

2. Is a lawfully admitted alien for permanent residence deportable for conviction of a drug related crime even though his State conviction has been set aside pursuant to Arizona's Restoration of Civil Rights act?. The Ninth Circuit has ruled that a State conviction retains its vitality for deportation purposes even though the State has judicially ordered the conviction set aside pursuant to the Restoration of Civil Rights act; Petitioner asserts otherwise.

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PETITION FOR WRIT OF CERTIORARI

A. This Petition for Writ of Certiorari is based upon the action of the United States Court of Appeals for the Ninth Circuit in Melesio Manuel Tapia-Acuna, Petitioner, vs. Immigration and Naturalization Service, Respondent, No. 79-7116, which resulted in a Memorandum Decision filed April 30th, 1980. The Memorandum Decision appears in the Appendix at page IX.

After the filing of the Memorandum Decision by a three judge panel in the Ninth Circuit, a Petition for Rehearing and suggestion for rehearing en banc was filed approximately on May 10th, 1980. On June 12th, 1980, an Order was issued out of the Ninth Circuit denying the Petition for Rehearing and the suggestion for rehearing en banc was rejected. Thereafter, on or about June 17th, 1980, Petitioner filed an Emergency Motion for Stay of Mandate so that application to the United States Supreme

Court may be made for a Writ of Certiorari, On June 25th, 1980, Judge Ferguson, for the Ninth Circuit, stayed the issuance of mandate until July 18th, 1980, so that a Petition for Writ of Certiorari could be filed in the United States Supreme Court. The Statutory provisions believed to confer upon this Court's jurisdiction to review by Writ of Certiorari the above referenced matter are: 28 USC §2101, 2016, and 1254.

B. The statutes which the case involves are: 8 USC §1251 (a)(11); 8 USC §1182 (c); A.R.S. former §13-1741, 42, 44, 45. The above sections are set forth in the Appendix at pages XII, XV, and XVI.

C. The facts material to consideration of the questions presented are as follows:

1. Petitioner Tapia entered the United States in July 3rd, 1963, as a child in the company of his parents for lawful permanent residence. He has continually resided in the United States and is the father of

young United States' citizens.

2. On July 31st, 1976, Petitioner was arrested by State of Arizona authorities for marijuana violations. On October 25th, 1976, the Petitioner admitted in Superior Court unlawful possession of marijuana for sale, pursuant to a plea agreement. The Court ordered that imposition of sentence be suspended for a period of three years upon the condition that the Petitioner pay a fine in the sum of $300.00 plus 10% surcharge. The Petitioner was further ordered to report to a Probation Officer at least once a month and ordered to conduct himself as a law abiding "citizen". The Arizona's Superior Court formal written judgment is dated November 1st, 1976.

3. On February 15th, 1977, an Immigration Order to Show Cause, and a Notice of Hearing were issued; it was charged that the Petitioner was deportable in that he had been convicted of a violation of law

related to the illicit possession of marijuana to-wit: A.R.S. §36-1002.06. The basis of the deportation was 8 USC §1251 (a)(11).

4. On April 27th, 1977, the deportation hearing was heard in Nogales, Arizona. The Immigration Judge ordered the Petitioner deported and denied discretionary relief pursuant to 8 USC §1182 (c).

5. The Petitioner thereafter timely filed a notice of appeal to the Board of Immigration Appeals.

6. On May 23rd, 1977, the Superior Court of the State of Arizona, issued a very broad order after finding that the statutory discretionary relief should be granted to the applicant. The relevant part of the order was as follows:

> "IT IS THEREFORE ORDERED that the Defendant's Probation shall be terminated, that the judgment of guilt previously entered on November first, 1976, shall be set aside, that the information herein shall be dismissed, and IT IS FURTHER ORDERED that Melesio Manuel Tapia be released from all penalties and

disabilities resulting from the conviction"

The Petitioner personally filed a copy of this order with the Immigration Office in Nogales, Arizona, on the same day, May 23rd, 1977. There was some delay in sending the record file to the Board of Immigration Appeals from the District Director's Office of Immigration in Phoenix, Arizona.

7. When the record was sent to the Board of Immigration Appeals, the above referred to Order was apparently not included therein. The Board of Immigration Appeals in its decision of September 25th, 1978, stated that "The Respondent's Petition for expungement of that conviction apparently has not been favorably acted upon."

8. On February 16th, 1979, Applicant again filed an application for advance permission to return to unrelinquished domicile, pursuant to 8 USC §1182 (c).

9. On March 19, 1979, the Petitioner filed a Petition for Review with the United States Court of Appeals, Ninth Circuit, pursuant to 8 USC §1105 A.

10. Pursuant to stipulation, Ninth Circuit proceedings were stayed pending the ruling by the Board of Immigration Appeals on a Motion to Reopen or Reconsider Petitioner's situation because of the problem in paragraph 7.

11. Pursuant to that stipulation and Motion to Reopen or Reconsider, on July 20th, 1979, the Board of Immigration Appeals responded. The Motion to Reopen or Reconsider was denied. After the Memorandum decision of the Ninth Circuit filed April 30th, 1980, a Petition for Rehearing En Banc was denied. A Motion for Stay of Mandate was then granted and this Petition for Writ of Certiorari has been filed.

D. The two issues presented for

review in this Petition for Writ of Certiorari are the same issues that were presented for review in the Ninth Circuit both in the Brief for Petitioner and in Oral Argument. The Memorandum Decision of April 30th, 1980, of the Ninth Circuit, clearly reflects these issues were the ones decided.

E. The basis for Federal Jurisdiction of the Court in the First Instance was 8 USC §1105 A.

F. This case is particularly ripe for decision by the United States Supreme Court because of Rule 17. Specifically there is a conflict between the various Courts of Appeals as to the specific questions presented for review. Briefly, those questions are:

1. The availability of a waiver of deportability pursuant to 8 USC §1182 (c), and,

2. The efficacy of a State restoring a person's civil rights in reference to

deportability pursuant to 8 USC §1251 (a)(11).

These are important questions which should be settled by the Supreme Court so that there may be uniformity of decisions in the various Circuits.

Indicative of the conflict between the Circuits are cases on one side favoring non-deportability such as Morera vs. INS 462 F2d 1030 (1st Circuit - 1972) and Rheman vs. INS 544 F2d 71 (2nd Circuit - 1976). Doe vs. Webster 606 F2d 1226 (D.C. Circuit 1979) provides a background discussion of restoration of civil rights. See also Re J (1957, Board of Immigration Appeals) 7 I & N Dec. 580 which held an alien was not convicted within 8 USC §1251 (a)(11) where imposition of sentence was postponed. (Tapia's imposition of sentece was suspended). Or Re Werk (1977, Board of Immigration Appeals) I & N Interim Dec. No. 2589 where a conviction expunged under 21 USC §844 (b)(1), or state counterpart, may not be used as a

basis for deportability. Opposite holdings favoring deportability in the Ninth Circuit in such cases as: Ocon - Perez vs. INS 550 F2d 1153 (1977), De la Cruz - Martinez vs. INS 404 F2d 1198 (1968), Cert. denied 394 U. S. 955 (1969), and Kelly vs. INS 349 F2d 473 Cert. denied 382 U. S. 932 (1965). Some decisions in the Fifth Circuit support this position. Gonzalez de Lara vs. U.S. 439 F2d 1316 (1971). Gutierrez - Rubio vs. INS 453 F2d 1243 (1972).

On the issue of discretionary relief pursuant to 8 USC §1182 (c) it was conceded by the Assistant Attorney General at Oral Argument in the Ninth Circuit, that the Ninth Circuit, alone among the Circuits denies this discretionary relief for Defendants in drug-related cases. This denial of discretionary relief is reflected in such cases as Bowe vs. INS 597 F2d 1158 (1979) and Dunn vs. INS 499 F2d 856 (1974) Cert. denied 419 U.S. 1106 (1975). However,

The Board of Immigration Appeals in Re Hinojosa (1979) I & N Interim Dec. No. 2718 held 8 USC §1182 (c) applicable to such an alien. Also Re Tanori (1976) I & N Interim Dec. No. 2467.

Wherefore Petitioner requests that the two issues presented be reviewed and a uniform rule decided.

Respectfully submitted,

Wayne A. Cypert,
Attorney for Petitioner

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Caption deleted,

Board of Immigration Appeals Decision dated September 25, 1978.

This case presents an appeal from a decision of the immigration judge on April 27, 1977, denying the Respondent's application for advance permission to return to an unrelinquished domicile, pursuant to the provisions of section 212(c) of the Immigration and Nationality Act, 8 USC 1182(c), as amended. The appeal will be dismissed.

The immigration judge noted that the respondent had a United States citizen wife and children and that he entered this country for lawful permanent residence in 1963. He found, however, that the Respondent had interrupted his unrelinquished domicile in the United States in June, 1971, when he was granted the privilege of voluntary departure, and thus was statutorily ineligible for section 212(c) relief. The immigration judge further noted that even

if the Respondent, who by now may have accumulated the requisite seven years of unrelinquished domicile in this country, was eligible for section 212(c) relief, he would have denied it in the exercise of administrative discretion. The immigration judge cited certain incidents involving marijuana, including the respondent's conviction and suspended sentence in 1976 for violation of Arizona Revised Statute 36-1003.06. The respondent's petition for expungement of that conviction apparently has not been favorably acted upon.

Section 212(c) of the Act provides in pertinent part:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning to a lawful, unrelinquished domicile for seven consecutive years may be admitted at the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a)."

Although the statute describes a waiver available to an alien seeking to enter the United States, we have held, in reliance upon the decision in Francis v. INS, 532 F.2d 268 (2 Cir. 1976), that section 212(c) relief may also be granted in deportation proceedings to a nondeparting permanent resident alien with seven consecutive years of lawful unrelinquished domicile. See Matter of Silva, Interim Decision 2632 (BIA 1976). See also Matter of Varagianis, Interim Decision 2537 (BIA 1976); Lok v. INS, 548 F.2d 37 (2 Cir. 1977).

Our review of the record persuades us that denial of section 212(c) relief was proper in the circumstances of this case. Cf. Matter of Marin, Interim Decision 2666 (BIA 1978). The respondent is not a youth. His conviction is a comparatively recent one and suspension of his three year sentence will not expire until November 1, 1979 (Ex. 3). Although we recognize fully the respondent's residency in the United States

and his family equities, we find that these equities are not sufficient to overcome the adverse factors in this case. Accordingly, in the exercise of our administrative discretion, the appeal will be dismissed.

ORDER: The appeal is dismissed.

//s//
Chairman

Caption deleted.

Board of Immigration Appeals Decision dated July 20, 1979.

This case presents a motion to reopen these proceedings to reconsider our order dated September 25, 1978 1/, wherein we dismissed an appeal by the respondent from a decision of the immigration judge denying his application for advance permission to return to an unrelinquished domicile, pursuant to the provisions of section 212(c) of the Immigration and Nationality Act, as amended, 8 USC 1182(c). The motion will be denied.

As indicated in our initial decision, the respondent was convicted upon a plea of guilty and received a suspended sentence in 1976 for unlawful possession of marijuana, in violation of Arizona Revised Statute 36-1002.06. The Board had not then been made aware that the above conviction was

in fact already expunged by the Superior Court of the State of Arizona on May 23, 1977. Nevertheless, the respondent can gain no benefit in these deportation proceedings by the expungement of his narcotics conviction. The Ninth Circuit has held repeatedly that expungement of a narcotics conviction does not remove the conviction as a basis for deportation. See Brownrigg v. INS, 356 F.2d 877 (9 Cir. 1966); Kelly v. INS, 349 F.2d 473 (9 Cir. 1965). cert. denied, 382 U. S. 932 (1965); Garcia - Gonzalez v. INS, 344 F.2d 804 (9 Cir. 1965) cert. denied. 382 U.S. 840 (1965). These cases support the decision this Board is, of course, bound. The Attorney General noted 20 years ago, at page 445, that "Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strenghtened the deportation laws dealing with aliens involved in such traffic." See also Hernandez-Almanza v.

INS, 547 F.2d 100 (9 Cir. 1976); Matter of Zingis, 14 I & N Dec. 621 (BIA 1974).

The respondent has conceded that he is deportable under section 241 (a)(11) of the Act, 8 USC 1251 (a)(11). His conviction had been based upon possession of 386 pounds of marijuana for sale, with an estimated value of $38,600. A waiver of excludability under section 212(c) of the Act is unavailable in the Ninth Circuit to any alien facing deportation for conviction of a drug-related crime, pursuant to section 241 (a)(11). See Bowe v. INS, No. 78-1496 (9 Cir. April 23, 1979); Nicholas v. INS, 590 F.2d 802, 808 (9 Cir. 1979); Dunn v. INS, 499 F.2d 856 (9 Cir. 1974) cert. denied, 419 U.S. 1106 (1975); Arias-Uribe v. INS, 466 F.2d 1198 (9 Cir. 1972); cf. Gutierrez v. INS. 323 F.2d 593 (9 Cir. 1963), cert. denied, 377 U.S. 910 (1964); Matter of Robinson, Interim Decision 2709 (BIA 1979). It would obviously be futile, therefore, to grant the motion to reopen

or reconsider because we could not, in the particular circumstances of this case, find the respondent eligible in a case reviewable only in the Ninth Circuit. We are obliged to follow the controlling precedents of the Court of Appeals in that circuit. 2/ Accordingly, we have no alternative but to deny the motion to reopen or reconsider. In view of our decision, we find that oral argument would not serve any useful purpose in this matter.

ORDER: The motion to reopen or reconsider is denied.

//s//
Chairman

1/ Consideration of a petition for review of our earlier decision has been stayed by the United States Court of Appeals for the Ninth Circuit pending our latest decision in this matter.

2/ We do so, however, while cognizant we have found that aliens with marijuana confictions in other circuits may be eligible for section 212(c) relief. See e.g. Matter of Varagianis, Interim Decision 2537 (BIA 1976); Matter of Silva, Interim Decision 2532 (BIA 1976).

Caption deleted,

Court of Appeals for the Ninth Circuit
Memorandum dated April 30, 1980

Tapia-Acuna petitions for review of a decision of the Board of Immigration Appeals (BIA) finding him deportable under 8 USC §1251 (a)(11)[1] on the ground that he had been convicted of unlawful possession of marijuana for sale.

Tapia-Acuna entered the United States in 1963 as an alien lawfully admitted for permanent residence. In October, 1976, Tapia-Acuna pled guilty to possession of marijuana for sale. In February, 1977, an Immigration Order to Show Cause and a Notice of Hearing were issued. The deportation hearing was held in April, 1977, at which time the immigration judge ordered Tapia-Acuna deported and denied discretionary relief pursuant to §212 (c) of the Immigration and Naturalization Act, 8 USC §1182 (c)[2].

In April, 1977, Tapia-Acuna appealed to the BIA, which affirmed the decision of the immigration judge in September, 1978. The BIA had not been informed, however, that Tapia-Acuna's 1976 conviction for possession of marijuana had been expunged under Arizona State law in May, 1977.

Tapia-Acuna filed a petition for review in this court on March, 19, 1979. He then filed a motion with the BIA to reopen and reconsider his case in light of the expungement. This court stayed review of the BIA's initial decision pending the BIA's action on the motion to reopen and reconsider. The BIA denied the motion, finding that deportation may be based on an expunged conviction, and that discretionary relief is unavailable to an alien convicted of a drug offense.[3]

A state conviction, even though expunged, retains its vitality for deportation purposes.

Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977); de la Cruz-Martinez v. INS, 404 F.2d 1198, 1200 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969); Kelly v. INS, 349 F.2d 473, 474 (9th Cir.), cert. denied, 382 U.S. 932 (1965). Tapia-Acuna is, therefore, properly deportable under 8 USC §1251 (a)(11).

Discretionary relief under §212(c) is not available to an alien found deportable for conviction of a drug-related crime pursuant to 8 USC §1251 (a)(11). Bowe v. INS, 597 F.2d 1158 (9th Cir. 1979); Dunn v. INS, 499 F.2d 856 (9th Cir. 1974), cert. denied, 419 U. S. 1106 (1975). The BIA did not, therefore, abuse its discretion by finding Tapia-Acuna deportable and not eligible for discretionary relief.

AFFIRMED.

FOOTNOTES

1. 8 USC §1251 (a)(11) provides in pertinent part:

   (a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who --

   (11) is, or hereafter at any time after entry ... has been convicted of a violation of ... any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of ... any law or regulation governing or controlling the ... sale, exchange, dispensing, giving away ... of ... marijuana ....

2. 8 USC §1182(c) provides in pertinent part:

   Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of paragraphs (1) - (25), (30) and (31) of subsection (a) of this section.

3. Tapia-Acuna did not file an additional petition for review with this court after BIA denied his motion to reopen and reconsider. Because of our disposition, we need not consider whether we may properly review the denial of that motion.

Caption deleted.

Court of Appeals for the Ninth Circuit
Order dated June 12, 1980.

The panel as constituted in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Ferguson have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Caption deleted.

Court of Appeals for the Ninth Circuit
Order dated June 25, 1980.

Upon due consideration of Petitioner's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for Writ of Certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 18, 1980.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

//s//
United States Circuit Judge
FERGUSON

*In the event that the motion for stay of mandate and the petition for Writ of Certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CA9-003- (12/3/79)

A.R.S. former §13-1741, 42, 44, and 45,

§13-1741. Definition

1. "Civil rights" means all the civil rights conferred on a person by the constitution and laws of this state and shall include the civil rights referred to in article 7, section 2 of the constitution of Arizona and §13-1653 of this title. Added Laws 1970, Ch. 221, §1.

§13-1742. Persons completing probation.

A. A person whose period of probation has been completed may have any civil rights which were lost or suspended by his felony conviction restored by the judge who discharges him at the end of the term of probation.

B. Upon proper application, a person who has been discharged from probation prior to the adoption of this article may have any civil rights which were lost or suspended by his felony conviction restored by the superior court judge by whom the person was sentenced or his successors in office from the county in which he was originally convicted. The clerk of such superior court shall have the responsibility for processing the application upon request of the person involved or his attorney. The superior court shall cause a copy of the application to be served upon the county attorney. Added Laws 1970, Ch. 221, §1. As Amended Laws 1971, Ch. 159, §1.

§13-1744. Setting aside judgment of convicted person upon discharge; making of application; release from disabilities; exceptions.

Every person convicted of a criminal offense other than a violation of §28-473, the provisions of title 28, chapter 6, or a violation of any local ordinance relating to stopping, standing or operation of a vehicle, but nevertheless including a violation of §28-661, 28-692, 28-692.02, 28-693 or any local ordinance relating to the same subject matter of such sections, may upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person, by his attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the pease or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction other than those imposed by the department of transportation ....

§13-1745. Restoration of civil rights ...

The restoratio of civil rights and the dismissal of the accusation or information under the provisions of this article shall be in the discretion of the superior court judge by whom the person was sentenced or his successor in office. Added Laws 1970, Ch. 221. §1.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1980, I served three (3) copies of the foregoing Petition for Writ of Certiorari for Petitioner upon The Solicitor General by mailing said copies Air Mail, postage prepaid to:

The Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-74

MELESIO MANUEL TAPIA-ACUNA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether an alien facing deportation for a drug-related conviction is eligible for discretionary relief under 8 U.S.C. 1182(c).

2. Whether respondent may be deported under 8 U.S.C. 1251(a)(1) for a drug-related conviction that has been expunged pursuant to Arizona law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. IX–XII) is not reported. The opinions of the Board of Immigration Appeals (Pet. App. I–VIII) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1980. A petition for rehearing was denied on June 12, 1980 (Pet. App. XIII). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1182(c) provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30) and (31) of subsection (a) of this section.

8 U.S.C. 1251(a) (11) provides in pertinent part:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (11) is, or hereafter at any time after entry has been * * * convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has

> been convicted of a violation of * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, giving away * * * or the possession for the purpose of the * * * sale, exchange, dispensing, [or] giving away * * * of * * * marihuana * * *.

STATEMENT

Petitioner, a native and citizen of Mexico, entered the United States in 1963 as an alien lawfully admitted for permanent residence (R. 19).[1] In June 1971, he was apprehended for having falsely claimed United States citizenship, but the disposition of that charge is not clear from the record (R. 64).[2] On October 25, 1976, petitioner pleaded guilty in the Superior Court of the State of Arizona to unlawfully possessing for sale 386 pounds of marijuana, in violation of Ariz. Rev. Stat. Ann. § 36–1002.06 (1974). Imposition of sentence was suspended for three years, conditioned, *inter alia*, on petitioner's payment of a $330 fine (R. 22, 77–78).

On February 15, 1977, the Immigration and Naturalization Service ordered petitioner to show cause why he should not be deported pursuant to 8 U.S.C. 1251(a)(11) on account of the marijuana conviction (R. 86). During the hearing to show cause, petitioner applied for a waiver of excludability pursuant to 8

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[1] "R." refers to the certified administrative record.

[2] Although the immigration judge found that petitioner had been granted voluntary departure on June 23, 1971 (R. 23), petitioner testified that he did not leave the country at that time (R. 38). Moreover, it does not appear that petitioner was the subject of deportation proceedings or was found deportable on that occasion.

U.S.C. 1182(c) (R. 19). In an oral decision (R. 19–25), the immigration judge ordered petitioner deported and denied him relief under Section 1182(c). He found that petitioner had been granted voluntary departure to Mexico in June 1971, which had interrupted the seven years' unrelinquished domicile required by Section 1182(c) (R. 23–24; but see note 2, *supra*). Moreover, the judge found (R. 24) that even if petitioner were eligible for Section 1182(c) relief, he would deny it in the exercise of his administrative discretion.[3]

Thereafter, in May 1977, petitioner's state conviction was set aside pursuant to the Arizona expunction statute, Ariz. Rev. Stat. Ann. § 13–907 (1978) (formerly Ariz. Rev. Stat. Ann. § 13–1744 (1976)). On September 25, 1978, the Board of Immigration Appeals affirmed the immigration judge's decision "in the exercise of [its] administrative discretion" (Pet. App. I–IV). The Board, however, had not been informed of the expunction of petitioner's marijuana conviction.

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[3] In so holding, the immigration judge relied (R. 24) on the following: (i) on November 7, 1971, petitioner was discovered with two others in a car containing 50 pounds of marijuana (R. 21, 39–42, 66, 68–69). Although the indictment against petitioner was dismissed (R. 71), the immigration judge, after hearing petitioner's account of the incident, concluded (R. 23) that the dismissal "was more than likely not because of any belief as to his innocence, but because of the technical difficulty in making the charge stick." (ii) On April 10, 1972, petitioner was discovered driving a car in which marijuana debris was found. Petitioner was told to report to the Nogales, Arizona, immigration office on the following day with his wife and father. At that time, the seriousness of petitioner's having been involved with marijuana on at least two occasions was explained to petitioner, his wife, and his father, and they were warned that "subsequent violations would surely lead to [petitioner's] deportation from the United States" (R. 72; accord, R. 21, 43).

Accordingly, petitioner moved the Board to reconsider his case. The Board denied the motion, holding that deportation may be based on an expunged conviction and that Section 1182(c) relief is unavailable in the Ninth Circuit to an alien facing deportation for a drug offense (Pet. App. V–VIII). The court of appeals affirmed (Pet. App. IX–XII).[4]

DISCUSSION

1. Petitioner correctly points out (Pet. 9–10) that there is a conflict among the circuits concerning whether an alien who has been convicted of and ordered deported for a drug-related offense is eligible to apply for discretionary relief under 8 U.S.C. 1182(c). On the one hand, the Ninth Circuit has held that aliens who have been ordered deported for drug-related offenses are not eligible for discretionary relief under Section 1182(c). *Bowe* v. *INS*, 597 F.2d 1158 (1979); *Nicholas* v. *INS*, 590 F.2d 802, 808 (1979). As the opinions in *Bowe* and *Nicholas* reveal, however, the Ninth Circuit's position in those cases arose, without further analysis, from a series of cases, which happened to involve convictions for drug offenses, in which the court denied eligibility for Section 1182(c) relief on the ground that the alien had not departed from and returned to this country subsequent to the

[4]Petitioner's request for review by the court of appeals was filed from the Board's initial decision, and petitioner filed no additional petition for review after the Board denied his motion to reopen and reconsider (Pet. App. XII n.3). Since the court of appeals had stayed its proceedings until the Board ruled on petitioner's motion to reopen, however, the court's ruling took into account the expunction of petitioner's Arizona conviction (Pet. App. X–XI).

conviction on which his deportation was based. See *Castillo-Felix* v. *INS*, 601 F.2d 459, 462 n.6 (1979); *Dunn* v. *INS*, 499 F.2d 856, 857–858 (1974), cert. denied, 419 U.S. 1106 (1975); *Arias-Uribe* v. *INS*, 466 F.2d 1198, 1199–1200 (1972).[5] On the other hand, the Second and the Tenth Circuits have held or assumed that aliens who have been ordered deported for violating drug laws are eligible for Section 1182(c) relief regardless of whether they have been deported from and returned to this country subsequent to the time when the ground for deportation arose. *Vissian* v. *INS*, 548 F.2d 325 (10th Cir. 1977); *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976).[6] See also *Byus-Narvaez* v. *INS*, 601 F.2d 879, 881 n.5 (5th Cir. 1979).

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[5] 8 U.S.C. 1182(c) has been construed to permit aliens who have committed deportable offenses and thereafter left the United States but were not excluded upon their return to apply for Section 1182(c) relief "nunc pro tunc" in a subsequent deportation hearing, on the theory that the discretionary relief that would have been available to them on reentry could be granted at the later deportation hearing. *Castillo-Felix* v. *INS*, *supra*, 601 F.2d at 462 n.5.

Eligibility for relief under Section 1182(c) has also been extended to deportation proceedings in which an alien has requested adjustment of status under 8 U.S.C. 1255. *In re Smith*, 11 I. & N. Dec. 325 (BIA 1965).

[6] In *Francis*, the Second Circuit held that the Ninth Circuit's construction of 8 U.S.C. 1182(c) in *Arias-Uribe* and *Dunn* as requiring an actual departure and return to the United States subsequent to the conviction on which deportation was based, although consistent with the statutory language, impermissibly and irrationally "creates two classes of aliens identical in every respect except for the fact that members of [the preferred] class have departed and returned to this country at some point after they became deportable" (532 F.2d at 272). In so holding, the Second Circuit assumed that aliens convicted of drug offenses are eligible for relief under Section 1182(c).

Following the Second Circuit's decision in *Francis*, the Board of Immigration Appeals has found aliens with drug convictions eligible for Section 1182(c) relief. *In re Marin*, 16 I. & N. Dec. 581 (1978); *In re Varagianis*, 16 I. & N. Dec. 48 (1976); *In re Silva*, 16 I. & N. Dec. 26 (1976). However, over the objections of the Immigration and Naturalization Service, the Board has applied a different rule in cases, like the present one, that have arisen in the Ninth Circuit, because the Board has felt itself bound by that court's decisions in *Bowe* and *Nicholas* (see Pet. App. VII–VIII & n.2).

In the government's view, the Ninth Circuit's position is without support in either the statutory language of Section 1182(c) or the case law on which the court of appeals has relied. See pages 4–5, *supra*. The INS believes that it is sufficient for the proper administration of the Nation's immigration program that the fact and nature of a drug conviction be taken into account in the discretionary aspect of the determination whether Section 1182(c) relief should be granted. See *In re Marin, supra*.

In this case, the INS urged the court of appeals to affirm the Board's order on the ground that "[t]his Court [the Ninth Circuit] has held * * * that relief under [8 U.S.C. 1182(c)] is unavailable to an alien facing deportation for conviction of a drug related crime" (Resp. Br. 7–8). This statement, although a correct summarization of the Ninth Circuit's precedents, does not reflect the government's current position that those precedents are erroneous and should be overruled. We submit, therefore, that the judgment below should be vacated and the case remanded to the court

of appeals for reconsideration in light of the position now advanced by the INS.

2. In view of the disposition we have urged above, the Court need not reach petitioner's contention that his expunged conviction could not serve as a basis for deportation under 8 U.S.C. 1251(a)(11). In any event, there is no merit to that claim.

Deportation is a matter of congressional policy (*Kleindienst* v. *Mandel*, 408 U.S. 753, 766–767 (1972)) and does not depend upon the fortuity of state law. The cases relied on by petitioner represent an exception (for which petitioner does not qualify, see pages 10–11, *infra*) to the general rule that an expunction under state law does not preclude use of the expunged conviction as a basis for deportation for a drug offense under 8 U.S.C. 1251(a)(11). *Ocon-Perez* v. *INS*, 550 F.2d 1153, 1154 (9th Cir. 1977); *Kolios* v. *INS*, 532 F.2d 786 (1st Cir.), cert. denied, 429 U.S. 884 (1976); *Gutierrez-Rubio* v. *INS*, 453 F.2d 1243, 1244 (5th Cir. 1972); *Gonzalez de Lara* v. *United States*, 439 F.2d 1316, 1318–1319 (5th Cir. 1971); *de la Cruz-Martinez* v. *INS*, 404 F.2d 1198, 1200 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969).

In *Mestre Morera* v. *INS*, 462 F.2d 1030 (1st Cir. 1972), the court of appeals held that an alien may not be deported on the basis of a narcotics conviction that had been expunged pursuant to a federal statute—the Federal Youth Correction Act, 18 U.S.C. 5005 *et seq.* The court emphasized (462 F.2d at 1032) that the Act's purpose "is to relieve [the youthful offender] not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of

a record tainted by such a conviction." It distinguished 18 U.S.C. 5021 from state expunction statutes on the ground (*ibid.*) that the former "clearly contemplates more than a 'technical erasure;' it expresses a Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions."[7] Accord, *In re Zingis*, 14 I. & N. Dec. 621 (BIA 1974).

In *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976), a divided panel of the court of appeals set aside a deportation order based on a conviction for "simple knowing possession[,] * * * New York's lowest grade drug offense" (*id.* at 72), which had been expunged under New York law. The basis for the court's decision, however, was federal policy, not state law. Specifically, the court found that if Rehman had been tried under federal law, he most likely would not have been deportable because, under 21 U.S.C. 844, "a first-offender guilty of simple possession of drugs can in the discretion of the court be placed on probation and never actually be convicted at all" (544 F.2d at 74). Moreover, under 18 U.S.C. 4216, a court may, "after taking into consideration the previous record of the defendant as to delinquency or criminal experience," sentence a "young adult offender" (one between the ages of 22 and 25) under the Federal Youth Corrections Act, expunction under which precludes deportation on the basis of the expunged conviction. *Mestre Morera* v. *INS*, *supra*; *In re Zingis*, *supra*.

[7] Indeed, in the subsequent case of *Kolios* v. *INS*, *supra*, the First Circuit upheld a deportation order based on a narcotics conviction that had been expunged under state law.

The INS recognizes, for deportation purposes, such congressionally-authorized expunctions as well as their state counterparts. See *In re Werk*, 16 I. & N. Dec. 234 (BIA 1977) (deportation proceedings terminated as improvidently begun where based on marijuana possession conviction that had been expunged pursuant to Wisconsin counterpart to 21 U.S.C. 844); *In re Andrade*, 14 I. & N. Dec. 651 (BIA 1974) (deportation proceedings terminated where based on a minor's marijuana possession conviction that had been expunged pursuant to California youth offender statute, but noting (*id.* at 654) that "this position does not apply * * * to expungement under state laws that do not have a federal counterpart"); *In re Zingis*, *supra*.

The Arizona statute under which petitioner's conviction was expunged has no federal counterpart.[8] It is

[8] Ariz. Rev. Stat. Ann. § 13–907 (1978) provides in pertinent part:

> Every person convicted of a criminal offense * * * may upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person, by his attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction * * * except that the conviction may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense * * * as if the judgment of guilt had not been set aside.

limited neither to the convictions of youthful offenders nor to convictions for the simple possession of drugs.[9] In addition, its purpose is not to render a record untainted by conviction for all purposes, but merely to reward a convicted person for good behavior during the service of his sentence by releasing him from certain disabilities otherwise imposed by Arizona law. Cf. *Garcia-Gonzales* v. *INS*, 344 F.2d 804, 808 (9th Cir. 1965). Thus, the Arizona statute provides that the expunged conviction "may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense * * * as if the judgment of guilt had not been set aside."[10]

In any event, petitioner was convicted not of simple possession of drugs but of possession *for sale* of 386 pounds of marijuana. Moreover, although petitioner was 24 at the time of his conviction, in light of the offense charged and petitioner's record of repeated involvement with marijuana (see note 3, *supra*) it is

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[9] In his concurring opinion in *Rehman* v. *INS*, *supra*, Judge Mansfield emphasized (544 F.2d at 75) that under the New York expunction statute a "Certificate of Relief from Disabilities" is awarded simultaneously with the judgment, thus "prevent[ing] the state court's adjudication of guilt from amounting to a conviction." Under the Arizona expunction statute, on the other hand, a conviction remains in full force until the conditions of sentence or probation are satisfactorily fulfilled (see note 8, *supra*).

[10] Expunction under the Arizona statute does not eliminate the conviction as a basis for a federal conviction under 18 U.S.C. 922(h) for possession of a firearm by a convicted felon. *United States* v. *Herrell*, 588 F.2d 711, 713 (9th Cir. 1978).

highly unlikely that he would have been accorded youthful offender treatment under federal law.[11]

CONCLUSION

The petition for a writ of certiorari should be granted only as to the first issue presented, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for reconsideration in light of the position now advanced by the government.

Respectfully submitted.

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OCTOBER 1980

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[11] Petitioner's reliance (Pet. 8) on *In re J___*, 7 I. & N. Dec. 580 (BIA 1957), is misplaced. In that case, the Board held that a disposition of a case that postponed the imposition of sentence, "unlike one which *suspended* the imposition of sentence," did not result in a conviction for the purpose of deportation (*id.* at 581 (emphasis in original)). Imposition of petitioner's sentence, of course, was suspended on the condition, *inter alia*, that he pay a $330 fine (Pet. 3; R. 22, 77–78). See *In re Varagianis*, 16 I. & N. Dec. 48, 49–50 (BIA 1976).

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